Supreme Court, U.S.
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In the

Supreme Court of the United States

DELBERT LEAVITT, JR, Etc; ET AL,
Petitioners,

versus

CITY OF EL PASO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

The lower courts ruled that Petitioners had established the existence of a fact question on whether or not the municipal police practiced a custom or policy of failing to fill out complaint reports of domestic violence calls as required by Texas law and City policy. Such laws were specifically enacted by Texas to protect victims of domestic violence and to prevent further acts of violence against them. As a legislative body, Texas lawmakers found that such victims, who are predominately women, were routinely ignored and refused equal police services. Although finding a fact question, the lower courts granted summary judgment to a municipality in this action, brought pursuant to 42 U.S.C. Section 1983, holding that such disparate police treatment was not a moving cause of Fourteenth Amendment violations. May a federal court impose stricter or heightened evidentiary requirements upon civil rights claimants seeking to defeat a summary judgment sought by a municipality on the issues of custom and causation.

PARTIES TO PROCEEDING

Petitioners named in full are as follows:

DELBERT LEAVITT, JR, acting as Legal Representative of the following minors and decedent's estate:

APRIL ALVAREZ,
STEPHANIE ALVAREZ,
ALEXIS ALVAREZ,
ALEJANDRO ALVAREZ, JR,
ELIZABETH ALVAREZ, and
ESTATE OF MARIA SUSANA ALVAREZ DEC'D,

DOLORES BALDEMAR, Individually.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 12

I. PETITIONERS SUBMITTED SUFFICIENT EVIDENCE TO SHOW AN ISSUE OF MATERIAL FACT ON WHETHER THE CITY OF EL PASO HAD A CUSTOM OR PRACTICE OF REFUSING TRUE POLICE SERVICES TO VICTIMS OF DOMESTIC VIOLENCE 13

A. Proof of Custom in Domestic Violence Cases 16

B. Evidence of Custom in Non-Domestic Violence Cases 17

C. Police Enforcement of Domestic Violence Laws in Texas 18

D. Petitioners' Evidence Supporting Inferences of a Discriminatory Custom 21

II. GENUINE ISSUES OF MATERIAL FACT EXIST ON WHETHER THE ALLEGED CUSTOM CAUSED CONSTITUTIONAL DEPRIVATIONS 23

CONCLUSION 29

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 5a

RELEVANT PROVISIONS 25a

TABLE OF CITED AUTHORITIES

Cases

Adickes v. Kress & Co., 398 U.S. 144 (1969)..... 14, 15
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986)..... 13, 14
Anderson v. United States, 417 U.S. 211, (1974)..... 18
Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) 15
Bielevicz v. Dubinon, 915 F.2d 845 (3rd Cir. 1990) 17, 18, 24
Brandon v. Holt, 469 U.S. 464 (1985)..... 18
Cellini v. City of Sterling, 856 F.Supp. 1215 (E.D. Mich. 1994) 17
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14
City of Canton v. Harris, 489 U.S. 378 (1989)..... 23
Crawford-El v. Britton, 523 U.S. 574 (1998)..... 14
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 192-196, 109 S.Ct. 998, 1004, n. 3 (1989)..... 12
Grandstaff v. City of Borger, 767 F.2d. 161, 171 (5th Cir. 1985) 17, 18
Macias v. IHDE, 219 F.3d 1018 (9th Cir. 2000) 25
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)..... 18
Monell et al. v. Department of Social Services of the City of New York et al., 436 U.S. 658, 98 S.Ct. 2018 (1988) 12, 14
Navarro v. Block, 72 F.3d 712 (9th Cir. 1996)..... 16
Rideau v. Jefferson County, 899 F.Supp. 298 (E.D. Tex. 1995) 17
Sherrell v. City of Longview, 683 F. Supp. 1108 (E.D. Tex. 1987) 16, 17
Smith v. City of Elyria, 857 F.Supp. 1203 (N.D. Ohio 1994) 17
Village of Willowbrook v. Olech, 528 U. S. 562, 120 S.Ct. 1073 (2000)..... 24, 25
Ware v. Jackson County, 150 F.3d 873 (8th Cir. 1998)..... 25

Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988) 16

Statutes

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 ..... 2, 12
42 U.S.C. §1983 14
Tex. Code Crim. Proc. Art. 5.04(a) 19
Tex. Code Crim. Proc. Art. 21.02 27
Tex. Code Crim. Proc. Art. 5.01 19
Tex. Code Crim. Proc. Art. 5.05 20
Tex. Code Crim. Proc. Art. 14.03(a)(4) 20
Federal Rule of Civil Procedure 56 14

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App., infra, 1a –4a) is unreported. The opinion of the United States District Court of the Western District of Texas, El Paso Division (Pet. App., infra, 5a – 24a), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 19, 2001. (Pet. App. 1a). This petition for writ of certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(See Appendix)

STATEMENT OF THE CASE

Statement of Proceedings

The five minor Alvarez children, April, Stephanie, Alexis, Alejandro Jr., and Elizabeth, and their maternal grandmother, Dolores Baldemar, filed this wrongful death and survivor action on behalf of themselves and the Estate of Maria Susana Alvarez ("Suzy Alvarez") against the City of El Paso and the United States of America. The Alvarez children brought suit individually and as representatives of their mother's estate through their maternal uncle and legal representative Delbert Leavitt.

Against Respondent City of El Paso, Petitioners alleged suit pursuant to 42 U.S.C. § 1983 among other theories of liability. Petitioners alleged that the City of El Paso deprived Suzy Alvarez of her constitutional rights to Equal Protection of laws through a custom of discriminatory police protection to victims of domestic violence.[1]

The City of El Paso filed a motion for summary judgment alleging that there was no evidence of a discriminatory policy to support municipal liability on the equal protection claim. Secondly, even if there were such a policy of the municipality itself it was not the cause of Suzy Alvarez' death.

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1. Separate from the allegations against the City of El Paso, Petitioners also brought suit for negligence under the Federal Tort Claims Act against the United States of America. Petitioners entered into a settlement agreement and dismissed with prejudice all claims against the United States of America.

The district court granted the City of El Paso's motion for summary judgment on all theories of liability. (Pet. App. 5a-24a). On appeal, the Fifth Circuit affirmed summary judgment. (Pet. App. 1a-4a).

Statement of Facts

From 1993 to 1997, Suzy Alvarez repeatedly made reports to the El Paso police alleging physical abuse and continuing threats of violence against her by her husband, Alejandro Alvarez. In addition to her reports, her two older daughters also called 911 trying to get police service to end the violence their father inflicted against their mother. Even a girlfriend of Alejandro Alvarez called police to report threats of violence he made against her. On March 7, 1997, Suzy Alvarez was shot and killed by her husband, a United States Border Patrol agent. She was killed a single day after her last unsuccessful attempt at getting police service to protect her from long term violence and death threats made against her by her husband.

Despite repeated reports of criminal behavior, the El Paso police failed to arrest Alvarez or seriously investigate allegations of abuse made against him by women victims. Although focusing primarily on Suzy Alvarez, the evidence shows a series of events over a prolonged period of time in which police officers repeatedly refused to enforce domestic violence criminal laws on a widespread and prevalent basis. Citywide statistics, expert testimony, and secondary evidence supported Petitioners' allegations of lesser police protection to victims of domestic violence in violation of the Equal Protection Clause of the Fourteenth Amendment.

March 1993

The first report of abuse to the El Paso police occurred in March 1993. Due to a beating by her husband, Suzy Alvarez had bruises and a black eye. Dick Nichols, a

relative, testified that he went with her to an El Paso police station to make a criminal report. Dick Nichols testified that the officer outright refused to make a criminal complaint against Alvarez. The desk officer stated, "being that [Alvarez] is a federal officer, that, you know, she needs to really take it easy and stop making these type of allegations." He also accused her of being an "overwrought housewife."

Nichols further testified that the officer also said "if she is really serious about him being violent or anything, she should go see the legal aid or see about getting a divorce from him, but to do what she was attempting to do would really hurt the Border Patrol – give the Border Patrol a bloody nose." "The officer handed back the paperwork, gave it to her and just asked her to go to the legal aid and do it civilly."

Mary Nichols', wife of Dick Nichols, also testified to a second occasion on which she went with Suzy Alvarez to a police station after a beating. Mary Nichols said Suzy Alvarez had bruises all over her. The officer on duty, however, made no report of the complaint and instead talked with her about how an arrest would harm Suzy's husband's career in law enforcement. Rather than handling the complaint as he would for any other assault victim, the police officer said, "sometimes family disputes can go ahead and be talked out."

March 1994

On March 1, 1994, Suzy Alvarez went again to a police station and reported another incident of family violence of which she said had occurred on February 20, 1994. She reported that her husband hit her arm and kicked her ankle and thigh. This time a police report was written and the officer documented his observation of bruises but took no pictures. After completion of the report, however, no further investigation or efforts were taken to make an arrest

even though the officer testified he had formulated probable cause to believe a crime had been committed.

June 15, 1994

On June 15, 1994, officers were dispatched to an apartment on a report of a family fight in progress. Upon arriving on the scene, the police officers interviewed Suzy Alvarez who reported that her husband had thrown her against a wall. She was four months pregnant and experienced pain. Officers arranged for an ambulance to take her to a hospital. Before leaving the scene, Suzy Alvarez gave a written affidavit requesting prosecution of her husband. Police officers wrote a report and advised her to contact the department again after 72 hours.

Within days, Suzy Alvarez met with Detective Laredo for a follow up interview. Laredo asked her about her husband's border patrol weapon. She mentioned "an incident." Detective Laredo told her that threats with a weapon, a felony charge, could cost Alvarez his job, "get him thrown out of the border patrol." Detective Laredo later prepared two misdemeanor charges for the incidents of March 1 and June 15, 1994. In his affidavit to the magistrate issuing warrants he intentionally left out the information he had obtained about a "gun incident."

Report of Threat with Weapon

On June 18, 1994, Suzy Alvarez went to a different station and reported Alvarez' had struck her with his fist on the mouth causing her to bleed and have pain. After being hit, she told him she was leaving him. In response, he took his duty weapon and put it to her head telling her he was going to kill her.

When she could safely leave, Suzy Alvarez went with her children and stayed at the shelter for battered women. She told her counselor she was afraid he would kill her for

going to police. Several days went by but Alvarez was not arrested or detained. Eventually, she left the shelter to stay with her mother.

April 1995

On April 28, 1995, Suzy Alvarez again called police to her home because of a threatening argument. Alvarez was not living with her. She asked him to leave and he refused to go. He ripped the shorts she was wearing just as the officers arrived on the scene. No charges were filed.

Alejandro's Drug Treatment

On August 19, 1995, Alejandro Alvarez checked himself into a hospital for a drug treatment program. On admission he claimed, "I cannot stop using speedballs," a mixture of cocaine and heroin injected intravenously. He also stated he was planning on shooting himself and admitted to being paranoid when he used cocaine. The admitting doctor diagnosed him as acutely suicidal and a serious risk of harm to himself or others.

October 1995

On October 15, 1995, one of the Alvarez children called 911. On arrival, police officers met with Suzy who reported her estranged husband shattered a large screen television by throwing a pumpkin. Scared by the events, the children called police. When the officers arrived, Alvarez was had fled the scene. Police wrote a report without interviewing the complaining witnesses who were the children who called 911. No photographs were taken and no efforts were made to arrest Alvarez despite officers' having formulated probable cause at the scene.

July 1996, August 1996, and January 1997

Three additional 911 calls were identified from computer dispatch records originating from the Alvarez residence for July 1996, August 1996, and January 1997. El Paso police officers failed to write reports for any of these 911 calls. Alvarez children testified they called for police several times because they were afraid in their home and wanted police help.

Report of Abuse against Luanna Bellah

In addition to the reports made by Suzy Alvarez and her children, a call to police for criminal threats of Alvarez was made by one of his girlfriends, Juanna "Luanna" Bellah. At two o'clock in the morning, on March 31, 1996, Bellah called El Paso Police to report that she was afraid and wanted police assistance because Alvarez was intoxicated and pounding on her front door in a threatening manner. Officers Lom and Wilburn responded to the call.

Petitioners' evidence of the events at the Bellah home include testimony from Luanna Bellah, testimony from police officers, and internal police documents prepared during a later internal affairs investigation of the incident. Luanna Bellah described the reasons she called police: "[Alvarez] was knocking and yelling 'real bad words.... [b]itch, whore, . . . open that fucking door." "He was yelling out those bad words. ... And I was getting more afraid, so I just called the cops."

In a later internal affairs investigation of the event, one officer plainly admitted preferential treatment. "I explained to [Alvarez] that the best thing for himself and his career was to sit in the patrol car so that we could take him home and he could sleep it off." Similarly, the other officer explained he never ran a warrants check that would have led to the discovery of Alvarez' outstanding warrant, because "[i]t's just the fact came out that he was a Border Patrolman,

and being in law enforcement, he wouldn't have any outstanding warrants."

One Day Before Murder

During the afternoon of March 6, 1997, Suzy Alavez's sister and brother in law, Dolores and Ramon Olivas, along with their three young children dropped in unexpectedly for a visit at the Alvarez home. Suzy Alvarez told her sister she was afraid for her life as her husband had been severely abusing her and threatening her life with his weapon. Dolores testified she told Suzy, "I'm taking you to the shelter."

Upon arriving at the shelter gate, Ramon Olivas testified they were told through an intercom to go to the nearest police station for a police escort into the shelter property. As instructed, they proceeded to the nearest station arriving at approximately 6 p.m.

The desk officer who first interviewed Suzy Alvarez admitted that she told him she tried to enter the shelter to escape from her husband. She also said she had reported abuse in the past but nothing was done. The desk officer then turned the matter over to a second officer. To the second officer Suzy Alvarez reported that her husband threatened her with his duty weapon and caused a burn injury on her arm still oozing and visible. Neither of the two officers wrote a report, nor bothered to look at computer records showing prior complaints and criminal history.

After a lengthy waiting period, the officer dispatched a police escort classifying Suzy Alvarez' plea as a non-police administrative matter. No police car was ever assigned to provide Suzy Alvarez with police protection. As the waiting continued, Dolores Olivas asked an officer if the police escort could also take Suzy to her house to get milk and pampers for her infant. Against department policy, the officer told her to "stay out of it" that police would only go to the shelter. Suzy Alvarez then said she would go back home for one more

night and wait for Alvarez to go to work the next day. Officer Durand encouraged her and assured her that her husband would likely go to work in the morning. Despite an entire shift of officers entering the station, Suzy Alvarez and her family waited for service but no unit was ever assigned to take them to the shelter.

March 7, 1997

The next day, on March 7, 1997, Suzy fled with her children to her mother's house. Alvarez found her there and killed her with his border patrol duty weapon. The local newspapers covered the murder and reported allegations from her family that Suzy had been to a station the night before her murder but police refused to help her. Based on the newspaper allegations, the police command ordered an investigation.

Petitioners submitted the post-murder investigation to show that indifferent police treatment of domestic violence permeated to the top of police command. At its conclusion, the investigation contained only a duty officer's memo, dispatch records and log sheets. No police officer ever interviewed any family members who witnessed events at the station. The investigation clearly showed that state mandated domestic violence report was ever prepared for the request for a shelter escort. Police officials quickly closed the investigation without taking any disciplinary action whatsoever.

Citywide Domestic Violence Statistics

Petitioners' evidence also includes citywide statistics as follows:

	DV Calls	DV Reports	No Reports
1995	N/A	7,424	N/A

1996	29,997	11,048	18,949
1997	29,952	10,548	19,404

Extrapolating from these reports, statistics show that of the thousands of domestic violence calls received annually by police dispatch operators, the great majority or approximately two-thirds, do *not* receive required written reports.

El Paso Police Federal Grant Application

In November 1995, the Mayor of El Paso applied for a Federal Grant to establish a Domestic Violence Prevention Coordination Unit. The grant application establishes the fact that the City policymakers were aware of the disproportionate harm to women caused by domestic violence stating:

> "Every five years, domestic violence kills as many *women* as the total number of Americans who died in the Vietnam War. The El Paso Police Department's second most frequent call for police service is a reactive response to allegations of domestic violence. During the first nine months of 1995, the department recorded 23,723 such calls, documented 5,918 incidents of threats of use of physical force, and made 2,548 arrests." (emphasis added).

Additionally, the grant application establishes the actual knowledge of the City to the fact that there is a great discrepancy between the number of domestic violence calls taken and the number of mandatory reports prepared by its officers.

Expert Testimony

Petitioners also submitted expert testimony from a police expert, Anne O'Dell, who attested that police afforded Suzy Alvarez discriminatory police protection. O'Dell further testified that police intervention was critical in preventing domestic violence and may drastically reduce the likelihood of further violence to the victim.

Finally, Petitioners' also submitted testimony from Dr. Caren Phelan, a psychologist who is an expert in the nature and dynamics of domestic violence and its effects on families. Dr. Phelan testified police employed "victim blaming" strategies to justify their non-intervention.

Dr. Phelan further explained:

> "Men who batter do so because they can and it works. Abusive men have received the message that violence against women is acceptable behavior. This message may come from a variety of sources ... When societal institutions such as the police ... do not hold men accountable for their violence, they actually collude with the batterer to perpetuate the violence."

In summary, Petitioners evidence, taken as a whole, shows genuine issues of material fact the elements of the claims of municipal liability precluding judgment as a matter of law.

REASONS FOR GRANTING THE WRIT

Courts have an obligation not just to identify constitutional violations but also to uniformly remedy such violations when they are discovered. The lower courts failed to satisfy that obligation in this civil rights case involving the death of a mother of five children. Although the lower courts acknowledged evidence of widespread police violations, the courts granted summary judgment, thus depriving Petitioners of a full hearing on the merits of their case. This compelling case calls for an exercise of this Court's jurisdiction because the decisions of the lower courts contradict Supreme Court precedent and directly conflict with decisions of other circuits including the Eighth, Ninth and Tenth Circuits.

This case offers an opportunity to guide lower courts in cases brought under 42 U.S.C. § 1983 on the accountability of a city police force that repetitively deprives certain disfavored citizens of their rights under the Equal Protection Clause of the Fourteenth Amendment. Exercise of jurisdiction will yield uniformity, clarity and predictability for lower court judges who struggle to comprehend the precise nature and extent of evidence required to survive summary judgment, on the essential elements of policy and causation, as imposed by *Monell et al. v. Department of Social Services of the City of New York et al.*, 436 U.S. 658, 98 S.Ct. 2018 (1988). In other words, a Supreme Court ruling will eliminate confusion and uncertainty among circuit courts faced with balancing the interests of victims who seek remedies for constitutional violations by municipalities that provide unequal police services.

Beginning with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 192-196, 109 S.Ct. 998, 1004, n. 3 (1989), this Court touched upon the constitutional deprivations caused by state actors who selectively deny state protective services to certain disfavored persons. This case offers evidence of unresponsive and indifferent police services to a particular and ever growing

class of citizens, namely, victims of family violence. By exercising jurisdiction over this case, the Supreme Court will bring uniformity and understanding to adjudication of municipal obligations arising from domestic violence calls for police service.

This Court's time and attention is merited as incidents of domestic violence generate, on a daily basis, one of the greatest demands for police services throughout our nation's cities. The Petitioners' case against the City of El Paso should have never been disposed of in light of the nature and extent of competent evidence submitted in response to the summary judgment motion. By submitting depositions, affidavits and other competent evidence, Petitioners' showed there was a substantial amount of evidence that supported the right for a jury trial on the important merits of this case. The lower courts' abused their discretion by weighing the evidence and making credibility determinations against the nonmovant civil rights claimants thus directly contravening long-standing Supreme Court precedent.

I. PETITIONERS SUBMITTED SUFFICIENT EVIDENCE TO SHOW AN ISSUE OF MATERIAL FACT ON WHETHER THE CITY OF EL PASO HAD A CUSTOM OR PRACTICE OF REFUSING TRUE POLICE SERVICES TO VICTIMS OF DOMESTIC VIOLENCE

Where conflicting evidence exists, it remains the role of a jury to determine whether or not evidence proves a civil rights cause of action in spite of concerns about exposing municipalities to burdens of litigation. Summary judgment of a party's complaint is appropriate only where there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the

suit under the governing law. *Id.* No matter how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring a claim, to opportunity to prove his case, and complaint is not subject to dismissal unless it appears to certainty that Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support its allegations. *Id.*

Summary judgment is authorized pursuant to Federal Rule of Civil Procedure 56(c) if there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. The burden of proof in this civil rights action remains the same as any other civil suit. It is improper to impose a clear and convincing burden of proof on plaintiffs at the summary judgment stage or at trial in a suit for damages pursuant to 42 U.S.C. §1983. *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998). Summary judgment evidence is viewed in the light most favorable to the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The essential elements of a § 1983 claim against a municipality require Petitioners to identify a policy of the city itself that causes a deprivation of constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Municipalities, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decisionmaking channels. *Id.*

Persistent refusals to apply laws that are fair and equal on their face qualify as actionable customs of a municipality. *Adickes v. Kress & Co.*, 398 U.S. 144, 167 (1969). In *Adickes*, this Honorable Court explained that, "Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South." *Id.* at 167. "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or neglect or refusal to enforce

their provisions, a portion of the people are denied equal protection under them." *Id.*

A genuine issue of material fact exists as to whether the City of El Paso's unwritten policy of providing lesser police services to victims of domestic violence was a moving cause of constitutional deprivations. This Honorable Court must grant this Petition for Certiorari so that it may clarify the reasoning and analysis that lower courts must apply when faced with a motion for summary judgment brought in a civil rights suit alleging a pattern or practice as a moving cause of constitutional violations.

In this case, Petitioners allege that a combination or series of complaints to police by Suzy Alvarez and their repeated refusals to arrest or seriously investigate, together with citywide statistical evidence, establish a deliberate indifference by the City sufficient to raise an inference of municipal custom. More specifically, Petitioners alleged the following municipal custom of the City of El Paso: (1) police engaged in a pattern or practice of affording inadequate or no protection to victims of criminal offenses based upon their status as victims of domestic violence; and, (2) police repeatedly shielded or protected Alejandro Alvarez from complaints of domestic violence because he was a law enforcement officer.

In its ruling, the district court quoted the definition of "custom" as a "persistent, widespread practice ... so common and well settled as to constitute a custom that fairly represents municipal policy." *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984). Ultimately, the district court found that a fact question existed on whether repetitive lack of police reporting encountered by Suzy Alvarez and thousands of other victims scattered throughout the city was "widespread enough to be a custom or policy." (Pet. App. 20a).

A. Proof of Custom in Domestic Violence Cases

Victims' asserting § 1983 claims have been successful in establishing an inference of a municipal custom with evidence showing repetitive denial of police protection linked with citywide statistics. Such evidence precludes summary judgment on the issue of municipal custom or practice of unconstitutional police protection.

For example, in *Watson v. City of Kansas City, Kansas*, 857 F.2d 690 (10th Cir. 1988), the series of reports made by the victim about her own case, which included five separate reports, along with arrest statistics of the department as a whole, precluded judgment as a matter of law. "Such a pattern, when examined in the context of other evidence the plaintiff has presented, constitutes evidence of a custom or policy." *Id.*

Similarly, in *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1996), the court precluded summary judgment based on testimony of a 911 operator about citywide dispatch procedures which established an inference of a municipal custom of lesser protection. The *Navarro* court also stated that once a showing of repetitive violations has been made, a municipality is liable for its custom irrespective of whether official policymakers had actual knowledge of the practice. *Id.* at 714-715.

Where a law enforcement officer commits abuse, courts have additionally recognized a valid § 1983 claim when it is alleged that the police department repeatedly shielded the abusive officer from criminal investigation. In *Sherrell v. City of Longview*, 683 F. Supp. 1108 (E.D. Tex. 1987), the court found that even though the child victim did not plead any facts other than those relating to his own case, nonetheless, the pleadings were sufficient for a § 1983 claim. *Id.* at 1114. "Together, the series of complaints to the police department, and the repeated refusal to arrest [the abusive father] indicates a 'deliberate indifference' or disregard by the Respondents sufficient at least to raise the inference of a

policy on the part of the city." *Id.* at 1115. Moreover, a showing that an abuse complaint against an officer was referred to internal affairs rather than treated as all other reports of crime creates a genuine issue of material fact precluding summary judgment. *Rideau v. Jefferson County*, 899 F.Supp. 298 (E.D. Tex. 1995).

Where, as here, domestic violence victims make persistent efforts to notify law enforcement officials of specific threats to them, and the officials nevertheless exhibit a complete indifference to their plight, the federal courts have demonstrated a reluctance to summarily dispose of such victims' equal-protection claims before they have been fully considered on the merits. See, e.g., *Smith v. City of Elyria*, 857 F.Supp. 1203 (N.D. Ohio 1994)(denied summary judgment on equal-protection claim by domestic-violence victim who repeatedly contacted the Respondent police officers before she was killed by her estranged husband); *Cellini v. City of Sterling*, 856 F.Supp. 1215 (E.D. Mich. 1994)(denied summary judgment on equal-protection claim by domestic-violence victim who contacted Respondent law enforcement 5 times over the course of 6 months).

B. Evidence of Custom in Non-Domestic Violence Cases

To determine whether there is a municipal policy or custom violating constitutional rights in non-domestic violence cases, courts regularly allow juries to draw inferences of municipal liability from repetitive misconduct. Prior incidents of abusive police conduct tends to prove a pattern and the accession to that custom by the policymaker. *Grandstaff v. City of Borger*, 767 F.2d. 161, 171 (5th Cir. 1985).

Municipal tolerance of a pattern of illegal arrests supports § 1983 liability. *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990). "[I]t is logical to assume that continued official tolerance of repeated misconduct facilitates similar

unlawful action in the future." *Id.* at 851. *citing Brandon v. Holt*, 469 U.S. 464 (1985).

In addition, examination of subsequent actions is common in cases where discriminatory motive is an element of the claim. For example, in employment discrimination cases, courts allow subsequent conduct to prove discriminatory motive in an employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Subsequent acts may tend to prove the nature of a prior conspiracy. *Anderson v. United States*, 417 U.S. 211, 219 (1974). Absence of reprimands, discharges, and admissions of error following an incompetent deadly use of force case tended to prove a preexisting policy. *Grandstaff*, 767 F.2d at 171.

Petitioners contend that the lower courts erred because they failed to examine the evidence, as a whole, with all reasonable inferences deduced therefrom in the light most favorable to the nonmovant. Petitioners' evidence does not show mere isolated events, but, rather, taken as a whole, allows a reasonable jury to infer that the City regularly practiced a custom of lesser police protection to victims of domestic violence.

C. Police Enforcement of Domestic Violence Laws in Texas

Because police protection is at the heart of the case, the analysis necessarily includes a review of the laws enacted by the State of Texas pertaining to domestic violence police enforcement. Over fifteen years ago, Texas legislators, like others in several states, found that police were treating domestic violence as something to be ignored or pushed aside without prosecution despite evidence of criminal violations. Fashioning a remedy meant to eliminate such discrimination against women, Texas lawmakers enacted specific legislation to require officers to treat violence as a criminal act,

regardless of the relationship between the alleged offender and the victim.

Specifically, the Texas Legislature enacted the Family Violence Prevention Act, providing the following legislative statement:

> (a) Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm or abuse or the threat of harm or abuse as is permitted by law.
>
> (b) In any law enforcement, prosecutorial or judicial response to allegations of family violence, the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.
>
> (TEX. CODE CRIM. PROC. Art. 5.01.)

From 1985 forward, pursuant to such family violence prevention laws, all Texas law enforcement officers responding to allegations of family violence were *duty bound* to (1) protect any potential victim of family violence, (2) enforce the law, and (3) make lawful arrests of violators. TEX. CODE CRIM. PROC. Art. 5.04(a).

Additionally, it became mandatory for Texas police officers to prepare written reports of all calls that may involve domestic violence and then file each report with the State regardless of whether or not any further police action is taken. "A peace officer who investigates a family violence incident or who responds to a disturbance call that may involve family violence *shall make a written report*, including but not limited to: (1) the names of the suspect and

complainant; (2) the date, time, and location of the incident; (3) any visible or reported injuries; and (4) a description of the incident and a statement of its disposition." TEX. CRIM. PROC., Art. 5.05. (emphasis added).

Texas lawmakers also made it easier for police officers to make a domestic violence arrest. Specifically, Texas law authorized warrantless arrests of persons who the peace officer had probable cause to believe had committed an assault resulting in bodily injury to a member of the person's family or household. TEX. CODE CRIM. PROC. Art. 14.03(a)(4).

As for the El Paso police, on paper, the department enacted procedures to underscore the criminal nature of allegations of family violence. In 1986, the department commanded its officers to "treat complaints of Family Violence as alleged criminal conduct and not as a civil problem." Consistent with state law mandatory provisions, the department policy also required written complaint reports in *all cases* where there was reason to believe that the use or *threat of* use of physical force against a member of the family or household had occurred. (emphasis added).

Probative evidence in this case shows that despite these measures, El Paso police officers openly, repetitively, and on a citywide basis refused to write reports in cases of reported domestic violence. It goes without saying that such reports are the bare minimum of police services as no further activity such as further investigation or arrests will follow without a report.

The pattern of police actions deprived Suzy Alvarez of the police services being afforded to other crime victims. Her status as a woman married to a law enforcement officer improperly played into their decisions not to act on criminal complaints. Supervisors who later discovered breaches of department policies and clear violations of state law overlooked repeated violations likewise showing a continuing tolerance or tacit approval of reluctance to provide basic police services to victims of domestic violence.

D. Petitioners' Evidence Supporting Inferences of a Discriminatory Custom

To establish a municipal custom, Petitioners submitted several different types of evidence that supports an inference of a widespread, prevalent practice of lesser protection to domestic violence victims as compared to victims of other crimes. First, there is the factual evidence of the series of events involving Suzy Alvarez by way of (1) testimony of three relatives, who give eye-witness accounts of three arbitrarily rejected complaints for which there are no police reports; (2) testimony of daughters, April and Stephanie, describing several 911 calls for which there are no police reports; (3) 911 records showing 3 calls to police for which there are no reports or police services documented; and, (4) five reports of Suzy Alvarez asking for police help in which no arrest is made and minimal investigation is done.

Secondly, Petitioners' presented statistical evidence that shows widespread, persistent, and repetitive practices of El Paso police in providing lesser police protection as evidenced by a severe lack of mandated reports on a citywide basis. Such reports, at a minimum, are a first step leading to eventual enforcement of domestic violence laws particularly against repeat offenders. Most importantly, the Texas Legislature established that reports in domestic violence cases are critically necessary tools leading to enforcement of criminal laws and prevention of further harm to victims and Texas families.

Thirdly, Petitioners also submitted a Federal Grant Application by the City used to obtain federal funds offered for local police programs focused on enforcement of domestic violence laws. In the application, the Mayor of the City admitted knowledge of the very statistics that show a great disparity between the number of domestic violence calls received and the number of reports written. Specifically, statistics show that for every two out of three times a victim of domestic violence called for help, El Paso police failed to

prepare a state mandated report. In other words, statistics show that more likely than not a police officer will not bother to write down the complaint made by a domestic violence victim much less engage in further police services.

Fourth, the evidence also includes affidavits from both a domestic violence survivor and a shelter counselor. The affidavits confirm the repetitive difficulty victims have had in getting basic police services on domestic violence calls. Affiant Tracy Yanez, a victim, testified she made several complaints that police failed to document and the few reports that were prepared failed to adequately describe her injuries as required by law. Moreover, counselor Gina Ruiz testified she witnessed negativity and obvious resistance from police officers to treating complaints as reports of criminal activity.

Fifth, supporting the same pattern of disparate denial of police protection, there is also evidence that police overlooked criminal behavior by Alvarez towards his girlfriend Luanna Bellah, in March 1996. Although officers found Alvarez highly intoxicated, evasive, combative, paranoid and threatening violence in their presence, sufficient to support probable cause, the officers kept the entire incident out of sight by not making a written report much less an arrest.

Taken as a whole, evidence in this case shows that concern for Alvarez' career and discriminatory treatment of a woman overpowered statutory duties pursuant to the Texas Family Violence Act to write complaint reports and enforce criminal laws. Disparate treatment comes to light from shift records of the same officers responding to certain non-domestic matters the very same day. The records show that the same officers who kept Alvarez' criminal threats 'off the books' diligently wrote a report on a theft of a $12 case of beer by unknown persons from a convenience store.

Additionally, after the murder, command staff of the El Paso police learned that there was no police report written documenting Suzy Alvarez' presence at the police station the

night before her death. They also learned from a tape recording to dispatch that officers classified Suzy Alvarez' request for police help as a non-criminal matter. In other words, threats of violence that cause a mother of five children to flee to a shelter were classified as civil in nature.

Having knowledge that Suzy Alvarez received no essential police services the night before her murder, the governing body of the police department made no effort to seriously investigate, discipline or issue reprimands for the violation of department policies. Such evidence supports the inference of a municipal custom to treat domestic violence victims differently from victims of non-domestic crimes.

Taken as a whole, Petitioners' evidence shows a pattern of treating Suzy Alvarez and other victims differently because they alleged criminal actions by a husband or boyfriend. Although it is recognized that police are given great latitude in determining how to provide protection to the public, nonetheless, it is a constitutional violation for police to establish a policy of affording protection with an "unequal hand." If the police do act in such a manner, then their discriminatory intent can be inferred and the evidence supports a § 1983 claim. When Alvarez kicked, punched and threatened his wife with a deadly weapon he was never arrested. When he drunkenly swung and missed hitting a police officer, he was wrestled to the ground, handcuffed and charged with a misdemeanor.

II. GENUINE ISSUES OF MATERIAL FACT EXIST ON WHETHER THE ALLEGED CUSTOM CAUSED CONSTITUTIONAL DEPRIVATIONS

A city does not incur liability under § 1983 unless there exists "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 378 (1989). To establish the necessary causation in a § 1983 claim, a plaintiff must

demonstrate a "plausible nexus" or "affirmative link" between the municipality's custom and the specific deprivation of constitutional rights at issue. *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990). "As long as the causal link is not too tenuous, the question of whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Id.* at 851.

The district court found that Petitioners' statistical evidence raised a fact issue concerning whether the City had a policy of not filing complaint reports. The court stated, "If true, this probably was in violation of Texas law." (Pet. App. 20a). Nonetheless, in granting summary judgment, the district court specifically stated that the Petitioners have a causation problem "because there is no evidence that writing reports would have prevented Alvarez from murdering his wife." (Pet. App. 20a-21a). The Fifth Circuit affirmed the summary judgment without reporting its reasoning. (Pet. App. 1a-4a).

By framing the causation issue in this manner the district court equated the murder itself, rather than the repetitive denial of equal protection of the laws, as the constitutional violation. In doing so, the court fundamentally misconstrued Petitioners' allegations and the summary judgment evidence.

Section 1983 imposes municipal liability for money damages or "redress" for the consequences of deprivation of constitutional rights. The controlling question on causation is whether or not the City violated the Equal Protection clause of the 14th Amendment, the alleged constitutional violation.

Petitioners alleged that the El Paso police deprived Suzy Alvarez of basic police services and treated her differently than other similarly situated victims of crime. See *Village of Willowbrook v. Olech*, 528 U. S. 562, 120 S.Ct. 1073 (2000). Denial of police services left her unprotected and simultaneously empowered Alvarez to believe that he could act violently without facing criminal penalties. No

rational basis existed for police to protect Alvarez' career with the United States Border Patrol when Suzy Alvarez reported criminal actions against her. *Id.*

In direct conflict with the decision of the Fifth Circuit, a Ninth Circuit court most recently ruled on the issue of causation in a factually similar case alleging § 1983 liability for failure to provide police services to a domestic violence murder victim. In *Macias v. IHDE*, 219 F.3d 1018 (9th Cir. 2000), the court reversed a summary judgment granted because the trial court had found the link between the last police contact and the actual murder to be too tenuous. In reversing the summary judgment, the Ninth Circuit ruled that the trial court committed error in focusing on the murder of the victim rather than the alleged constitutional deprivation of equal police protection rights. *Id.* As the *Macias* court explained, in a § 1983 claim it is well recognized by *Monell* and its progeny that the alleged constitutional deprivation is the denial of equal police protection to domestic violence victims. *Id.* at 1027-1028.

Similarly, in *Ware v. Jackson County*, 150 F.3d 873 (8th Cir. 1998), the court upheld a jury verdict against a county on a § 1983 claim involving the rape of an inmate where evidence established tolerance of a pattern of sexual misconduct at a county jail. The *Ware* court found the evidence of repetitive misconduct sufficient to show the County's custom was a moving force behind the violations of constitutional rights. *Id.* at 885. "It is axiomatic that unpunished crimes tend to breed more criminal behavior." *Id.* at 885.

By repeatedly shielding Alvarez from arrest and from full investigation of his abusive behavior, Petitioners contend that the custom not only permitted or encouraged Alvarez to continue in his abuse, but also deprived Suzy Alvarez of critically necessary equal police protection. Reckless disregard not to act on the complaints about Alvarez qualify as affirmative links between the municipal custom and the deprivation of her equal protection rights.

Even Respondent's own police expert conceded that a jury finding of favoritism to protect Alvarez' career would violate the Constitution as well as departmental policies. Petitioners' evidence in this case not only shows a violation of equal protection rights, it also shows a causal link between the failure to provide police protection and the eventual murder. Evidence directly from the City itself established the causation between enforcement of domestic violence laws and the prevention of domestic violence murders. In its federal grant application, the Mayor on behalf of the City police stated, "when the system treats a single slap, push or punch as serious, it sends a strong message to the abuser, the victim, and the community. Effective, aggressive misdemeanor arrest and prosecution *can prevent violence from escalating to felony level or homicide.*" (Emphasis added).

Secondly, the federal grant application also states, "[a]rresting the batterers and booking them into jail sends the message that their behavior is illegal. Research has shown that the recidivism rate of individuals who complete an effective one year counseling program is less than 15%."

Thirdly, Petitioners' evidence also included opinions from domestic violence police expert Anne O'Dell who attested to foreseeability of harm. She testified that indifferent police attitudes play a role in increasing lethality. Risk of deadly violence increases when officers advise a victim to leave a batterer but fail to prepare safety plans and fail to physically restrain the batterer. "[Trained police] make sure that the victims are given safety plans ... because to leave without having a safety plan in place is to put the victim at more risk. At the same time, we realize that our job as law enforcement officers is to enforce the law."

Expert O'Dell also testified that batterers' resort to deadly violence most often when a victim tries to leave. "I'm basing this on my knowledge of batterers, that they will do this whenever they fear being abandoned, whenever they fear

their victim leaving and them losing power and control. It's what batterers do."

Police expert O'Dell further explained as follows:

> "And what my experience is, is this, that whenever we fail to use the power of the law to stop the abusive conduct of an individual in our community, if we are law enforcement officers, and that's what we are paid to do, then we are instead of stopping it, we are empowering that individual to do more and more."

In its motion for summary judgment, Respondent asserted that Suzy Alvarez caused her own death by failing to cooperate and dropping charges. Such argument plainly contradicts the City's grant application in which it is stated:

> "[r]esearch has shown that victims become less hostile when they understand, at every stage of the criminal justice process, that *they are not responsible for the decision to arrest or prosecute the abuser*."

Additionally, all criminal charges by law are brought "in the name and by authority of the State of Texas," and not due to victims' desires. TEX. CODE CRIM. PROC. ART. 21.02. Petitioner's evidence showed that Alvarez threatened Suzy Alvarez' life if she reported him to authorities. Although not relevant to police duties, whether or not Suzy Alvarez dropped charges because of threats of deadly retaliation, because of police indifference to her plight, or voluntarily, is a factual dispute requiring jury determination.

Petitioners' evidence also showed that police officers were not adequately trained to handle domestic violence cases where they based their arrest decision solely on the

desire of the victim rather than traditional probable cause analysis. As expert O'Dell explained, domestic violence victims often recant and this is another aspect of the dynamics that officers must be prepared to address.

Based on Petitioners' evidence, a reasonable jury could infer that repeated tolerance of criminal abuse tacitly encouraged and emboldened Alvarez to continue his abusive ways. Also, a reasonable jury could infer that enforcing laws against Alvarez more likely than not would have caused him to modify his behavior.

An arrest would have put Alvarez into the criminal justice system where he would be monitored and counseled. If abuse continued, Alvarez would have likely been physically restrained in jail. With monitoring by the criminal justice system, Alvarez' increasing dependency on cocaine and heroin would likely have been discovered leading to discharge from the United States Border Patrol and relinquishment of his duty weapon. Proper documentation of each complaint would have increased the likely success of later prosecutions, as the full history of abuse would then come to light.

In summary, Petitioners evidence established the existence of a factual dispute on whether the City of El Paso's custom of lesser protection to victims of domestic violence caused deprivations of 14th Amendment rights. Police justifications for nonintervention are based on offensive, sexist stereotypes regarding women. Policies based upon stereotypic and archaic notions of gender relations violate the constitution. Battered women deserve the same level of police protection as is given to any other victim in the community. Disputed facts preclude summary judgment on the issue of whether Petitioners established a discriminatory custom of police services to victims of domestic violence.

CONCLUSION

The Fifth Circuit and the Western District of Texas have placed a high burden of proof upon Petitioners to overcome a summary judgment motion. The petition for a writ of certiorari should be granted to clarify the parties' burden, order a proper remedy for the Petitioners, and reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

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U.S. COURT OF APPEALS
FILED

JUN 19 2001

CHARLES R. FULBRUGE III
CLERK

(any footnotes trail end of each document)
Leavitt v. The City of El Paso

00-50636

UNITED STATES DISTRICT COURT FOR THE FIFTH CIRCUIT

June 19, 2001, Decided

PER CURIAM:*

On March 17, 1997, Maria Susana Alvarez ("Suzy") was shot and killed by her husband, Alejandro Alvarez ("Alejandro"), a United States Border Patrol agent, with his duty weapon. Alejandro was subsequently convicted of murder. Suzy's estate, her five minor children, and her mother brought suit under 42 U.S.C. § 1983 through her brother, Delbert Leavitt ("Leavitt") against the City of El Paso ("City") claiming violations of equal protection and substantive due process.fn1 The district court granted summary judgment in favor of the City on all of Leavitt's claims which he now appeals.

This Court reviews summary judgments denovo, reviewing all disputed facts and reasonable inferences "in the light most favorable to the nonmoving party." Duffy v. Leading Edge Prods., 44 F.3d 308,312 (5th Cir. 1995). Federal Rule of Civil Procedure 56(c) notes that summary

judgment is appropriate where "there is no genuine issue of material fact and.. . the moving party is entitled to judgment as a matter of law."

Leavitt argues that the trial court erred when it granted summary judgment in favor of the City on his substantive due process claim. He claims that the City created a danger when it did not provide Suzy transportation to a battered woman's shelter the evening before her murder and according to a contract the City had with the shelter.2 Leavitt also contends that the trial court erred when it granted summary judgment in favor of the City on his equal protection claim that the City had a policy or custom of providing less police protection to victims of domestic violence than to victims of other crimes. See Monell v. New York City Dept of Soc. Sew., 436 U.S. 658, 694 (1978). Leavitt moreover argues that the district court erred when it held that the City was immune from Leaviit's a claim under the Texas Tort Claims Act ("TFCA").

The City responds that neither Leavitt's complaint nor the summary judgment evidence presents any substantive evidence of a City policy or custom that deprives citizens of their constitutional rights. It moreover argues that the El Paso Police Department did not have a duty to control the acts of Alejandro because there was no "special relationship" between Suzy and municipal employees. Vaquera v. Salas, 810 S.W.2d 456, 461 (Tex. App.-San Antonio 1991, writ denied). The City also asserts that it is entitled to sovereign immunity under the TTCA because none of the three exceptions to municipal liability, claims arising out of the operation or use of motor-driven vehicles, claims arising from premises defects, and claims arising from the condition or use of personal property, is satisfied here. See TEx. Civ. Prac. & REM. CODE § 101.021fn3

Suzy's death at the hands of her husband and in front of at least two of her children is unfortunate indeed. Having fully reviewed the record, we cannot conclude, however, that the district court erred when it granted summary judgment We, therefore, affirm.

AFFIRMED.

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except wider the limited circumstances set forth in 5th Cir. R. 47.5.4.

fn1Leavitt also brought claims for negligent supervision and negligent entrustment of a weapon against the United States under the Federal Tort Claims Act. The district court granted summary judgment in favor of the United States on the negligent entrustment claim. Leavitt and the United States subsequently agreed to dismiss the remaining claim.

fn2Although this Court has not recognized this theory, it has not eliminated the possibility of a due process claim based on state-created danger. See Piotrowski v. City of Houston, 51 F.3d 512, 515 (5th Cir. 1995) (stating that "[w]hile this Court has not affirmatively held that this theory is a valid exception to the DeShaney rule,... . . it has addressed what a plaintiff would have to demonstrate to qualify for relief under this theory").

fn3The City also contends that this Court does not have jurisdiction to hear this appeal because it claims that Leavitt filed a premature notice of appeal. We find, however, that Federal Rule of Appellate Procedure 4(a)(2) permits this Court to exercise jurisdiction. See Barrett v. Atlantic Richfield Co., 95 F.3d 375, 379 (5th Cir 1996) (stating that the Fifth Circuit had jurisdiction over a case in which the plaintiff filed a notice of appeal before all claims were resolved against all parties arid when the district court had

not certified the nonfinal judgment under Federal Rule of Civil Procedure 54(b)).

FILED

JUL 1 0 2000

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. BP-99-CA-76-EP

DELBERT LEAVI1T, JR, et al.,

Plaintiff

vs

THE CITYOF EL PASO and
UNITED STATES OF AMERICA

Defendants.

Suzy Alvarez' a death was the culmination of al engthy abusive relationship with her husband. She had gone to the El Paso police department several times with claims of abuse, even visiting a police station the night before she was killed. Mrs. Alvarez had also complained to the Border Patrol, her husband's employer.

Agent Alvarez did not have a particularly impressive employment record at the Border Patrol. He was originally hired in November 1988 and was stationed in Laredo, Texas. In 1992, he transferred to El Paso. In October 1994 he received a reprimand for conduct unbecoming a Service officer. According to the U.S.'s summary judgment evidence, this conduct appears to be aggravated assault against Suzy Alvarez. In March 1995, he received a three-day suspension for sleeping on duty. This was followed shortly by three more incidents of sleeping on duty and two unauthorized absences from work. In June 1995, he told the Border Patrol that he had a drinking problem for which he required help. Subsequently, he was counseled for poor performance, and was observed looking "gaunt and haggard" and reaching for the butt of his gun when asked if he was all right. (Def. U.S.A. Exhibit 5). In August 1995, he was admitted to a rehabilitation center, and on August 31, 1995, he was issued a firm choice letter indicating that he had to either receive effective alcohol treatment or he would be fired. The letter also indicated that he would be fired if he engaged in "any misconduct such as sleeping on duty, alcohol or drug related misconduct, or [had] alcohol or drug related performance deficiencies." On March 31, 1996, he was arrested for driving while intoxicated. This arrest resulted in a letter from the Border Patrol proposing Alvarez's removal as an agent. Despite this letter, he was not fired. He did, however, sign a last chance agreement in August 1996, indicating he would comply with Border Patrol regulations or else he would lose his job.

Suzy Alvarez had several dealings with the El Paso Police Department concerning her husband during the course of her marriage. In March 1993, she went to the East Valley Station 'with complaints of abuse. While there, the desk officer suggested that she deal with this problem through the civil justice system, so as not to injure the Border Patrol's

reputation. In March 1994, she again went to the police. This time a complaint was filed. Arrest warrants were issued for Alejandro Alvarez but were eventually canceled. There is a fact issue about whether Suzy Alvarez actually requested that the charges be droppect On June 15, 1994, police went to the Alvarez home because of a fight. Later, Suzy called the detective on the case and requested that charges be dropped. She again went to the police station on June 18, 1994 reporting that her husband had assaulted her and had pointed a gun at her and threatened to kill her. A complaint was filed, and a police report later indicates that Suzy Alvarez did not want to press charges on this complaint. Police were again called to the Alvarez home in April 1995, resulting in a written complaint being filed.

Additionally, Alejandro Alvarez had another series of incidents involving the El Paso police. On March 31, 1996, Juana Bellah, a woman who had dated Alejandro Alvarez shortly before the incident, called the police because Alejandro was drunk, beating on her door and yelling. He also threatened to kick in the door. Ms. Bellah called the police. Officers Lomfn1 and Wilburn arrived approximately two minutes later. Ms. Bellah told them that Mr. Alvarez was her ex-boyfriend, that he was a border patrol agent and that she wanted them to take him home. She testified at her deposition that the police officer's demeanor changed immediately once they heard he was a border patrol agent. The officers drove him home but left his car parked in her driveway. The officers dropped him off at his apartment, without turning him over to anyone.

Ms. Bellah then left her house. Once she returned, she discovered that her house had been burglarized. She again called the police, telling them that she suspected that Alejandro Alvarez had committed the crime. Two different officers arrived at her house. While the officers were investigating the burglaries, Mr. Alvarez drove up to her

house. Once he pulled into the driveway, the officers smelled alcohol and asked Mr. Alvarez to get out of his car. He refused to cooperate, became aggressive, and was arrested for driving while intoxicated and resisting arrest.

The evening before she was murdered, Ms. Alvarez went to the El Paso Shelter for Battered Women but was turned away because of a policy of not accepting women into the shelter unless they had a police escort. She then went with her sister, brother-in-law, and children to the East Valley police station in El Paso. Although there are fact disputes about details of this visit, when viewed in the light most favorable to the Plaintiffs, they arrived at the station around 6 p.m. Ms. Alvarez requested a police escort to the shelter. It is undisputed that she originally told the officer at the front desk that her husband had not abused her in the immediate past. Her sister, Dolores Olivas, however, told the officer that Mr. Alvarez had previously taken his wife to the desert, pointed a gun at her head and threatened to kill her. Once her sister showed the officer a burn on Ms. Alvarez's arm, Ms. Alvarez told the officer that her husband had caused the burn. At some point, the officer called for a police escort, but refused to take Ms. Olivas to pick up diapers and milk for Ms. Alvarez's baby. Ms. Alvarez decided to go back home and return to the station for an escort the next day when her husband would be at work. The desk officer did not try to change her mind and held the door open for her on her way out. She and her family left the station around 6:53 or 6:58. The next day, after having left Alejandro Alvarez, she was killed at her mother's house.

Mrs. Alvarez's estate, her children and her mother bring suit against the City of El Paso (the "City") and the United States of America. They sue the United States under the Federal Tort Claims Act, 28 U.S.C. § 2674 ("FTCA") for negligently entrusting Agent Alvarez with a firearm. They sue the City under 42 U.S.C. § 1983 for violation of due process and

equal protection rights. They also sue the city for negligence.

In its motion for summary judgment, the United States argues that it is entitled to sovereign immunity under the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a). In its motion the City argues that it is immune from the state law claims and that the Plaintiffs cannot establish either their Due Process or Equal Protection claims. The City also filed a motion to strike various pieces of the Plaintiffs' summary judgment evidence. This motion is denied because the Court finds the evidence actually used in ruling on the motion for summary judgment to be admissible.

Summary Judgment Standard

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250 n.4 (1986); Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. See Celotex Corp., 477 U.S. at 325; Lavespere, 910 F.2d at 178.

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. See Fields v. City of South Houston, 922 F.2d 1183, 1187 (5th Cr. 1991). The

nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists. See Celotex, 477 U.S. at 324; Fields, 922 F.2d at 1187. In order for a court to find there are no genuine material factual issues, the court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving patty is insufficient to enable a reasonable jury to return a verdict for the nonmovant. See Liberty Lobby, 477 U.S. at 249-50; FED. R. Civ.P.56(e).

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. Celotex, 477 U.S. at 322-24; Fontenote, 780 F.2d at 1194-95.

Discretionary Function - FTCA

The FTCA generally waives the United States' sovereign immunity for tort claims, such that the United States is liable "in the same manner and to the same extent as a private individual wider like circumstances." 28 U. S.C. § 2674.fn2 Within this broad waiver of sovereign immunity, the FTCA provides an exception for claims involving the exercise of discretionary functions. This exception provides that sovereign immunity is not waived for:

Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be

abused.

28 U.S.C. § 2680(a).

Exceptions to the FTCA's waiver of sovereign immunity are to be construed in favor of the government. McNeily v. United States, 6 F.3d 343, 347 (5th Cir. 1993).

Whether the discretionary function exception applies is determined by a two-part test. To be a discretionary function, first there must be an element of judgment or choice involved. Gaubert, 499 U.S. at 322-23. If a statute, regulation or policy requires a particular course of action, then this first prong is not met because the government employee has no choice but to comply. Id. at 322. Secondly, the judgment or choice must be based on public policy considerations. Id. at 323.

Negligent Supervision and Retention

The claims that the United States negligently supervised and retained Agent Alvarez relate to two kinds of decisions made about him. Particularly, the Plaintiffs argue that the United States was negligent in the discipline it took against Alvarez. Additionally, they argue that the United States should have acted differently concerning Alvarez's drug use, in terms of the issues addressed by the United States' motion, the Plaintiffs point to two policies: the Standard Schedule of Disciplinary Offenses and Penalties for Employees of the U.S. Department of Justice and the Immigration and Naturalization Service's Drug Free Workplace Program.

Courts of Appeal have frequently held that employment decisions, such as whom to hire or how to supervise an employee are discretionary functions. See, e.g. Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d t207, 1217 (D.C. Cir. 1997) ("hiring, training, and supervision choices

are choices 'susceptible to policy judgment'"); Tonelli v. United States, 60 F.3d 492 (8th Cir. 1995) (dismissing negligent hiring claims and stating that "issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception).

Nevertheless, the general understanding that there is no discretion to violate policy must apply in the employment context; as well. The Plaintiffi point to several policies which they argue were violated by the United States. Although most of these policies give the Border Patrol discretion in their decisions involving the supervision and retention of employees, a fact question exists as to whether the drug program provided any discretion not to discipline Alejandro Alvarez.

Upon a finding of drug use, the employee must be receive some kind of disciplinary action, although the extent of the disciplinary action appears to be subject to the supervisor's discretion. See also Supervisor's Guide at 7. Additionally, the INS' Drug Free Workplace - Applicant and Employee Drug Testing Program provides that "[u}pon a finding of illegal drug use, action shall be taken as specified in Chapter 4, paragraph K. of the DOJ plan."fn3

The DOJ Plan describes that an DOJ employee may be "found" to use drugs "on the basis of any appropriate evidence." (Id. at K.l) This evidence includes direct observation or evidence from an arrest or conviction. In this case, there is a fact question as to whether the INS had "any appropriate evidence." The Plaintiffs have presented evidence that the records from Agent Alvarez's stay at a rehabilitatlon center were sent to INS office of security in DC. These records indicated a daily use of cocaine and heroin This could possibly be a finding of drug use.

Therefore, although the extent of the discipline is left to the supervisor's discretion, there was no discretion not to impose some discipline upon a finding of drug use. Therefore, there is a fact question as to whether the United States is entitled to immunity, and therefore the Plaintiffs' claims based on negligent supervision and retention can survive based on the question whether the Border Patrol had a finding of drug use which would require some disciplinary action to be taken against Agent Alvarez.

Alternatively, the Plaintiffs also appear to argue that the supervisors should have tested under the reasonable suspicion testing program. The Department of Justice Drug-Free Workplace Plan provides that "first-line supervisors shall ... [i]nitiate a reasonable suspicion test after first making appropriate factual observations and document those observations and obtaining approval from the second line supervisor." (DOJ Plan at Ch. 3 (3. 2.) Additionally, the plan provides that:

Reasonable suspicion testing may be based upon, among other things:
(1) Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;
(2) A pattern of abnormal conduct or erratic behavior...
(4) Information provided either by reliable and credible sources or independently
corroborated
(DOJ Plan at Ch. 4,A.3).

Nothing in this provision makes ordering reasonable suspicion testing mandatory. Although a fact question exists whether there were observable phenomena, a pattern of abnormal conduct or erratic behavior, or whether the INS in DC had received information under paragraph (4), a resolution of these questions in the Plaintiffs' favor would

not take the decision out of the discretionary realm.

Negligent Entrustment of of Firearm

Although neither side points to any cases on point, the decision whether to entrust a border patrol agent with a firearm would generally appear to be a discretionary function, Whether to issue an agent a firearm involves a choice or judgment, and the enforcement of laws at the border would implicate policy.

The Court has found no statute, regulation, or policy that would remove the United States' discretion in this regard. The Plaintiffs point to several violations of the INS Firearm Policy by Agent Alvarez, but these violations do not address the issue of whether the INS had discretion to entrust him with a firearm. Whether Agent Alvarez violated the policy by carrying his gun does not address the issue of the United States' discretion. Therefore, the United States is entitled to claim immunity based on the discretionary function.

Therefore, the United States is entitled to immunity based on the discretionary function exception to the FTCA for the negligent entrustment claim.

City of El Paso

The Plaintiffs bring several claims against the City for violation of due process, violation of equal protection and negligence. To establish a claim under 42 U.S.C. § 1983, the Plaintiffs must establish both a violation of the Constitution or the laws of the United States and that the violation was committed by a person acting under color of state law.

Substantive Due Process

As a general rule, in the absence of a "special relationship"fn4 the state has no obligation under the Due

Process Clause of the Fourteenth Amendment to provide protection from a private person. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989). DeShaney is applicable to this case, and therefore, it would appear that there is no cause of action based on the City's flilure to protect Ms. Alvarez. The Plaintiffs argue, however, that they have a claim under the Due Proeess Clause based on the theory of state-created danger.

Although the Fifth Circuit has never recognized a due process claim based on state-created danger, it also has not eliminated the possibility of such a claim. Piotrowskt v. City of Houston, 51 F.3d 512, 515 (5thCir. l995);Johnsonv. Dallas Indep. Sch. Dist,38 F.3d 198,201 (5thCir. 1994). For liability under this theory, a state actor must have created a dangerous environment, he must know of its dangerousness and he must have created an opportunity that would not have existed otherwise fin the third party's crime to occur. Johnson, 38 F.3d at 201.

The Plaintiffs argue that when the City entered into a contract with the El Paso Shelter for Battered Women to provide transportation to the shelter they increased Ms. Alvarez's vulnerability to private violence. They also argue that this contract removed her ability to engage in self-help because it resulted in the Shelter's refusal to accept women who arrive at the shelter without a police escort. However, the contract between the City and the shelter cannot form the basis of a state-created danger claim because the "'state-created danger' theory is inapposite without a known victim." Saenz v. Heldenfels Bros., 183 F.3d 389, 391 (5th Cir. 1999) (holding that a sheriffs decision to permit a drunk driver to stay on the road does not implicate due process because the due process clause concerns deliberate deprivations and the sheriff was not aware that the eventual victims of the driver were on the road). Furthermore, the City's contract with the shelter was for the police to provide an escort to the shelter and an escort

to allow the victim to pick up personal items. (Plaintiff's App. at kk). There is no evidence that it was anything but purely the shelter's policy not to accept women without an escort. (Id. at N, KK) There is no evidence that the City had anything to do with the creation of this policy. Therefore, the City did not create the danger caused by the shelter's policy.

Additionally, the Plaintiffs argue that the police department's refusal to escort her immediately to the shelter, when combined with the agreement between the City and the shelter, created a danger in violation of the Constitution. Again, there is no evidence that the City played any role in creating the shelter's policy. Furthermore, the Plaintiffs have produced no evidence that time Ms. Alvarez was waiting, and would have to wait, for an escort was a dangerous environment created by the police. The Plaintiffs make much of the officer's escorting of Ms. Alvarez front the station (described elsewhere as holding the door open), but this act, which came after Ms. Alvarez had decided to leave did not create a dangerous situation. Therefore, the Plaintiffs' claims for due process violations must fail.fn5

Equal Protection

Although in the absence of a special relationship or perhaps in the situation of state-created danger, there is no constitutional right to police protection, the police may not "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. DeShaney, 489 U.S. at 197 n.3. Generally, equal protection claims are concerned with discrimination on the basis of a class. Wheeler v. Miller, 168 F.3d 241,251(5th Cir. 1999). To establish an equal protection claim, the Plaintiffs must first establish that others similarly situated were treated differently. Id at 252. Further, this discrimination must have been intentional, Edwards v. Johnson, 209 F.3d 772,779 (5th Cir. 2000). The two groups the Plaintiffs allege were

deprived of their rights to equal protection of the laws are: 1) victims of domestic violence and 2) victims of acts of domestic violence committed by law enforcement personnel.fn6

Several courts have recognized that victims of domestic violence can be a class protected by the equal protection clause. See e.g. Shipp v. McMahon, 199 F.3d 256 (5th Cir. 2000); Navarro v. Block, 72 F.3d 712, 717 (9th Cir. 1996). When recognized, this claim is often tied to the idea that discrimination against victims of domestic violence is discrimination against women, a well-established protected class. Shipp, 199 F.3d at 262 (describing claims that a sheriff's office "afforded less protection to women victims of domestic violence than other victims"). The Court will assume without deciding, that the second category, that of victims of domestic abuse committed by law enforcement officers can form the basis of an equal protection complaint, as well.

Policy

Respondeat superior cannot form the basis of a municipality's liability under Section 1983.

Monell v, Department of Soc. Servs., 436 U.S. 658,691(1978). Vicarious municipal liability, then, only arises when the injury is based on the municipality's policy or custom. Id Policy can either be officially adopted by a lawmaking official or it can include "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Bennet v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984).

The Plaintiffs have not presented evidence of policy to

support municipal liability for Ms. Alvarez's dealings with police officers.fn7 They have not provided evidence of a widespread practice common enough to be policy. They have pointed to no evidence that any policymaker was involved in any of the times Ms. Alvarez sought police protection or aid.

Regarding their argument that the City had a policy of treating victims of domestic violence worse than victims of other crimes, the Plaintiffs present an affidavit of a former domestic violence instructor who taught a seminar which "a large group" ofEl Paso police officers attended. She stated that the" witnessed negativity and obvious resistance from the officers to treating victim complaints as reports of crime. Several officers openly and loudly stated in the presence of supervisors that they would not do anything at a domestic violence call because the female victim would later drop charges and it would be a waste of police time." (Gina Orona-Ruiz Aff. at ¶ 9). However, she gave no indication of the reaction of the supervisors. Comments made by individual officers are not policy.

The Plaintiffs point to three different incidents when Ms. Alvarez went to the police as indicative of policy. (pp 9-10). However, the three items, even when combined, do not show the existence of a fact issue on the question of policy. Three islsolated incidents do not establish a persistentl widespread practice sufficient to establish a custom or policy. The three incidents the Plaintiffs particularly point to are as follows 1.) the statement made by a desk officer when Ms. Alvarez went in to make a complaint in March 1993 that she should handle the matter civilly instead of through the police was not policy so as not to "give the Border Patrol a bloody nose" 2.) a detective, in June 1994, when obtaining a warrant, did not tell the magistrate about Mr. Alvarez's use of a weapon resulting in the issuance of a warrant for a misdemeanor rather than for a felony because a felony would cost Mr. Alvarez his job and 3.) the incidents at the police station the evening before her

murder.

Although the Plaintiffs argue that the shielding of Mr. Alvarez from legal consequences of his action extended to the poicymaker level within the police department, they provide no evidence directly in support of this contention. Instead, they rely upon post-incident investigations of the behavior of Officers Lom and Wilburn and investigations following Mrs. Alvarez's murder. Subsequent investigations, and specifically the results of those investigations, can be used to establish policy. (Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985). However, in this case, the subsequent investigations fall short of establishing a fact question about the existence of a policy.

An internal investigation was conducted following Mr. Alvarez's arrest at Juana Bellahs' house. This investigation was based on Officer Lom's and Wilburn's decision to drop Agent Alvarez off at his apartment instead of turning him over to a responsible adult and their failure to document the incident. The later decision that the disciplinary charges be dropped on this one incident does not establish a fact issue about the existence of a policy.

The Plaintiffs argue that the shortcomings of the polices' internal post-murder investigation established a municipal policy. This investigation, conducted by Captain Nava, a station commander, was arguably not as thorough as it could have been. However, the Plaintiffs do not establish any connection between this investigation and any City policy of discrimination against the victims of law enforcement domestic abuse or of domestic abuse in general. In connection to the investigation, the Plaintiffs also point to a statement made by a police spokesman to the effect that Mrs. Alvarez had only waited at the station for five minutes. However, the Plaintiffs never establish any connection between this statement and any policy of violating the equal

protection rights of victims.

Additionally, the Plaintiffs argue that the City's failure to train its police officers can be used to establish its liability. A municipality's failure to train police can subject it to Section 1983 liability only when the failure to train shows deliberate indifference to residents' constitutional rights. City of Canton v. Harris, 489 U.S. 378,389(1989). The Plaintiffs point to no evidence to create a fact question whether any lack of training was the result of deliberate indifference. Therefore, failure to train its police cannot make the City liable in this case for the acts of its employees.

Finally, the Plaintiffs have established the existence of a fact question whether the act of not filling out complaint reports for domestic violence calls, as required by state law, was widespread enough to be a custom or policy, even though the writing of such a report was required by the City's written policy. Police officers did not write a report each time Mrs. Alvarez went to the police.

Similarly, another domestic violence victim indicated that officers did not prepare a complaint report every time that the police came to her house to answer calls about abuse or threats of violence. (Tracey Yanez aff. at ¶ 4). The Plaintiff also include statistics indicating that in 1996 and 1997 reports were not filed every domestic violence call dispatched. (Plaintiffs' Ex. HH). This evidence raises a fact issue concerning whether the City had a policy of not filing complaint reports on every call of domestic violence. If true, this probably was in violation of Texas law. Nevertheless, the policy of not filing complaint reports is not relevant to the Plaintiffs' claim that the City discriminated against victims of domestic abuse committed by law enforcement.fn9 More importantly, if the policy in question is only that of not filing complaint reports in domestic violence cases, the Plaintiffs have a causation problem. The Plaintiffs make no allegation

that making a written report, in and of itself, would have prevented Agent Alvarez from committing murder Although the Plaintiff produces a statement by the police department that "[e]ffective, aggressive misdemeanor arrest and prosecution can prevent violence from escalating to felony level or homicide," they have produced no information that a report would necessarily lead to an arrest and prosecution. Nor do they produce any evidence suggesting that the writing of a report on March 6, 1997 or on earlier dates would have prevented Agent Alvarez from murdering his wife.

Therefore, because there is no evidence of any policy other than not creating written reports, summary judgment will be granted in favor of the City on the Plaintiffs' equal protection claims.

Texas Tort Claims Act

The City argues that the state law tort claims against it are barred by the Texas Tort Claims Act ("TTCA"). The TTCA limits municipal liability solely to claims for property damage, personal injury or death caused by I) the operation or use of motor vehicles and equipment; or 2) the condition or use of tangible personal property or real property. TEX. Civ. PRAC. & REM. CODE § 101.021.

First the Plaintiffs argues that the TTCA should be interpreted extremely broadly in this domestic violence case. In support of this, the Plaintiff cites to the Texas Family Violence Prevention Act, which requires that officers responding to family violence calls create written crime reports. They also point of a Texas policy that policy should maximum protection to victims of domestic violence. Despite this, in the absence of any indication that Texas courts have interpreted or would interpret the Texas Tort Claims Acts in this manner, the Court cannot create such a broad exception to sovereign immunity.

Additionally, the Plaintiffs argue that their state law claims fall under the categories provided in the TTCA in three ways. They argue that using a patrol car to drive Mr. Alvarez home in March 1996 constituted a misuse of a motor vehicle. They further argue that Officer Durand's use of the police department's computer system and printer to print copies of all documents was a misuse of tangible personal property.fn10 Finally, they argue that by not arresting Alvarez, the police failed to use their handcuffs, guns, car and police station.

The Plaintiffs' arguments that their state law claims fall under the TTCA waiver of sovereign immunity must fail. The use of the patrol car to drive Mr. Alvarez home in March 1996 is not the proximate cause of Mrs. Alvarez's murder on March 17,1997. Similarly, the Plaintiffs have pointed to no causal connection between Officer Durand's use of police department computers and the murder of Suzy Alvarez. Finally, non-use of police equipment does not constitute use under the TTCA, Kauen v. Hatley, 887 S.W2d 4, 16 (Tex. 1994). To find that the Plaintiffs' negligence claims are caused by the use of property or motor-driven vehicles would be to stretch the language of the TTCA beyond the limits that Texas courts have provided or are likely to provide. Regardless of how strong their negligence claims might be, the Plaintiffs cannot overcome the City's immunity from tort claims.

Conclusion

Accordingly, it is ORDERED that Defendant, United States of America's Motion for Summary Judgment (Docket No. 64) is granted in part and denied in part such that the Plaintiffs' claims for negligent supervision and retention remain for trial, that Defendant City of El Paso's Motion to Dismiss or, in the Alternative, Motion for Summary

Judgment (Docket No. 67) is GRANTED, that Defendant City of El Paso's Motion to Strike and Objections to Plaintiffs' Summary Judgment Proof (Docket No. 76) is DENIED, that Defendant City of El Paso's Motion to Strike and Objections to Plaintiffs' Designated Expert Witnesses (Docket No. 84) is DENIED AS MOOT and that Plaintiffs' Motion to Exclude Testimony of Defendant City of El Paso's Expert Robert Taylor, Ph.D. (Docket No. 86) is DENIED AS MOOT.

Footnotes

fn1Alejandro Alvarez's brother had been Officer Lom's partner in thc police departmcnt.

fn2 The Fifth Circuit has held, therefore, that for a claim of negligence to be actionable under the FTCA, the duty involved in the claim must be created by state law. Johnson v. Sawyer. 47 F.3d 716,729 (5th Cir. 1995). An FTCA claim cannot be based on a violation of federal statute, even when the plaintiffs are claiming that the violation of a federal statute constitutes negligence per se under state tort doctrine, Id. Therefore, Plaintiffs' claim that the United States was negligent per se based on its violation of is u.s.c. § 44 and Title VII of Public Law 90-3 5 is not actionable under the FTCA.

fn3 The Court notes that this statement is from the section of the policy concerning random testing

fn4The Fifth Circuit has held that a special relationship only arise,c when a party is involuntarily confined through the affirmative use of state power. Walton v. Alexander, 44 F.3d 1297, 1306 (5th Cir. 1995).

fn5 Additionaliy, the Plaintiffs' response includes a section entitled "El Paso Police Depart.nent Deliberately Ignored

Texas Criminal Law Mandates." In this section, the argue they the City violated various aspects of Texas law by not protecting Suzy Alvarez, by not arresting Alejandro Alvarez without a warrant and by not filing a written report. The Plaintiffs do not argue how these violations apply to their claims. These violations do not implicate a fundamental right, nor do they form the basis of a procedural due process claim.

fn6 their response to the City's motion, the Plaintiffs never separately delineate the two classes. Nevertheless, in some parts of their response, they argue equal protection generally for victims of domestic violence. See Plaintiffs' response at p. 5-6, 15. In other parts of their response, the Plaintiffs focus more on the Border Patrol / law enforcement aspect. Id. at 16, 18.

fn7 The Plaintiffs did not sue any of the officers in their individual capacities.

Fn8 The Plaintiffs have not clearly established what the policy at issue is. See Plaintiff's Response at 7 ("custom and practice of shielding Alejandro Alvarez, a fellow law enforcement officer, from arrest and further intervention from the criminal justice system"); Id. at 8 ("policy of shielding agents or police relatives"); Id. at 10 ("policy or custom of discriminatory or disparate treatment of domestic violence victims"); Id. at 11 ('widespread practice of favoritism and shielding of law enforcement domestic abuse'); Id. at 17 ("custom of treating law enforcement domestic abuse less seriously than other crimes").

fn9 Nothing in the summary judgment evidence indicates that Ms. Yanez.'s husband was involved with law enforcement

fn10There is evidence that Officer Durand printed Alejandro Alvarez's case file from the computer system in April 1996 even though he was not assigned to the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Issues

The Fourteenth Amendment of the United States Constitution, in relevant part, provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Issues

42 U.S.C. § 1983, in relevant part, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Texas Family Violence Prevention Act, provides:

> Art. 5.01 Legislative Statement
>
> (a) Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm or abuse or the threat of harm or abuse

as is permitted by law.

(b) In any law enforcement, prosecutorial, or judicial response to allegations of family violence, the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.

Art. 5.04 Duties of Peace Officers, in pertinent part, provides:

(a) The primary duties of a peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence are to protect any potential victim of family violence, enforce the law, and make lawful arrests of violators.

(b) A peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent further family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims.

Art. 5.05 Reports and Records, in pertinent part, provides:

(a) A peace officer who investigates a family violence incident or who responds to a disturbance call that may involve family violence shall make a written report, including but not limited to :

(1) the names of the suspect and complainant;
(2) the date, time, and location of the incident;
(3) any visible or reported injuries; and
(4) a description of the incident and a statement of its disposition.

Art. 14.03. Authority of Peace Officers, in pertinent part, provides:

(a) Any peace officer may arrest, without warrant:

(4) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to a member of the person's family or household.

Supreme Court, U.S.
OCT 30 200

No. 01-552

In The

Supreme Court of the United States

DELBERT LEAVITT, JR., ET AL.,

Petitioners,

versus

CITY OF EL PASO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is there any summary judgment evidence presented by the Petitioners that would show, or even suggest, that the Respondent, The City of El Paso ("City") maintained a custom or policy of violating the civil rights of the Petitioners or any other citizen? In addition, is there any conduct on behalf of City employees that constitutes a waiver of the City's sovereign immunity from tort liability?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

CITATIONS OF OPINIONS AND JUDGMENTS BELOW 1

STATUTES NOT CONTAINED IN PETITIONERS' WRIT 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 137 L. Ed. 2d 626, 117 S.Ct. 1382 (1997) 6

Campbell v. City of San Antonio, 43 F.3d 973 (5th Cir. 1995) 7

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) 6

City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989) 7

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L. Ed. 2d 791 (1985) 7

Conteq Realty, Inc. v. Siegler, 894 S.W.2d 195 (Tex. 1995) 8

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S.Ct. 998 (1989) 3, 5

El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987) 8

Jane Doe "A" v. Special School Dist., 901 F.2d 642 (8th Cir. 1990) 7

Johnson v. Dallas Independent School District, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995) 4

Kassen v. Hatley, 887 S.W.2d 4 (Tex. 1994) 9

Leffall v. Dallas Independent School District, 28 F.3d 521 (5th Cir. 1994) 4

LeLeaux v. Hampshire-Fannett I.S.D., 839 S.W.2d 56 (Tex. 1992) 9

TABLE OF AUTHORITIES – Continued

Page

Marroquin v. Life Management Center for MH/MR Services, 927 S.W.2d 228 (Tex. App. – El Paso 1996, writ dism'd) 9

McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989) 6

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978) ...6, 7

Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995) 4

Piotrowski v. City of Houston, 51 F.3d. 512 (5th Cir. 1995) 3, 4

Rodriguez v. Avita, 871 F.2d 552 (5th Cir. 1989) 7

Saenz v. Heldenfels Bros., 183 F.3d 389 (5th Cir. 1999) 5

Skipper v. U.S., 1 F.3d 349 (5th Cir. 1993) 8

State v. Terrell, 588 S.W.2d 784 (Tex. 1979) 10

University of Texas Medical Branch at Galveston v. York, 871 S.W.2d 175 (Tex. 1994) 9

Vaquera v. Salas, 810 S.W.2d 456 (Tex. App. – San Antonio 1991, *writ denied*) 8

Wheeler v. Miller 168 F.3d 241 (5th Cir. 1999) 6

Wilkins v. State, 716 S.W.2d 96 (Tex. App. – Waco 1986, writ ref'd n.r.e.) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES & REGULATIONS:

Tex. Crim. Proc. Code, Art. 5.01 et seq. 5

Tex. Crim. Proc. Code, Art. 5.04(a), 14.03(a) 5

Tex. Civ. Prac. & Rem. Code, § 101.021 .....1, 9

Tex. Civ. Prac. & Rem. Code, § 101.055(3).....2, 10

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the United States District Court and Fifth Circuit Court of Appeals are contained in Petitioners' Appendix to their Petition for Writ of Certiorari. All references by respondent in its opposition brief will be to those contained in Petitioners' Appendix.

STATUTES NOT CONTAINED IN PETITIONERS' WRIT

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or negligence of an employee . . . if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle . . . and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property. . . . Tex. Civ. Prac. & Rem. Code § 101.021.

This chapter [waiver of immunity provisions] does not apply to a claim arising:

(3) from the failure to provide or the method of providing police or fire protection. Tex. Civ. Prac. & Rem. Code § 101.055(3).

STATEMENT OF THE CASE

The factual summary set out by the petitioners is chronologically correct; however, there are some misleading or exaggerated portions, too numerous to enumerate here. As an alternative, the respondent incorporates the trial court's summary of facts, as stated in the judgment of July 10, 2000. (Petitioners' appendix, pp. 5a-8a).

SUMMARY OF ARGUMENT

Under any theory of law, there is no evidence that the City promulgated an unconstitutional custom or policy directed at the petitioners or those similarly situated. There is no "state-created danger" exception to the basic principle of law that the Constitution does not require the police to affirmatively protect an individual from the acts of third parties. In addition, there is no waiver of the City's governmental immunity, nor is there any other cause of action which could implicate the City in the death of Mrs. Alvarado at the hands of her deranged husband.

ARGUMENT

A. Due Process/The Right to Police Protection

1. Constitutional Violation

A logical starting point in any § 1983 analysis is the determination of what, if any, constitutional rights have been violated and, logically, who may have violated them, if at all. *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995). In the arena of police protection, this Court has held that the government's failure to protect a person against private violence – that is, violence by a third, non-governmental party – simply does not constitute a violation of the due process clause. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 192-96, 103 L. Ed. 2d 249, 109 S.Ct. 998 (1989).

The Constitution does not require police to affirmatively protect life or liberty against the acts of third parties, but it only serves as a buffer between the state and the individual. There is, then, no constitutional protection against crimes committed by criminals or madmen. *Id.*, 489 U.S. at 195-196.

2. The "Special Relationship" Theory as Exception

When the government imposes restraints – that is, imprisonment, institutionalization, or temporary custody – there *may* exist a "special relationship" and, by extension, a greater duty to protect. *DeShaney*, 489 U.S. at 202; *Piotrowski*, 51 F.3d at 515. But, here, there is no evidence that Mrs. Alvarez was ever confined, nor that the City police took her into protective custody, and such an exception would not apply.

3. The "State-Created Danger" Theory as Exception

Another exception to the general police-protection rule – and one gaining limited, conversational popularity, but not widespread judicial acceptance – is the idea of the "state-created danger" theory of constitutional violation. But to recognize such a broad and ill-defined exception would be, according to the Court of Appeals for the Fourth Circuit, the "first step down the slippery slope of liability" where

> [e]very time a police officer incorrectly decided it was not necessary to intervene in a domestic dispute, the victims of the ensuing violence could [sue]. . . . Indeed, victims of virtually every crime could plausibly argue that if the authorities had done their job, they would not have suffered their loss. *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995).

With the particular facts of this case, no state-created danger ever existed but, even if such a theory were viable, a potential plaintiff must show, in addition to other elements, that the government acted with "deliberate indifference" in failing to protect one from danger – a very high and difficult standard. *Piotrowski*, 51 F.3d at 515-16, n.8; *Leffall v. Dallas Independent School District*, 28 F.3d 521, 530-31 (5th Cir. 1994). Specifically, plaintiffs must show that (1) the environment created by the City police was dangerous; (2) the police knew it was dangerous; and (3) the police used their authority to *create an opportunity* that would not otherwise have existed for the murder to have occurred. *Johnson v. Dallas Independent*

School District, 38 F.3d 198, 200-01 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995).

In addition, the state-created danger theory of liability is invalid without the presence of a "known victim." *Saenz v. Heldenfels Bros.*, 183 F.3d 389, 391 (5th Cir. 1999). In *Saenz*, this court held that an officer's decision not to arrest a drunk driver (who later caused the deaths of two individuals) did not implicate due process considerations, and went on to say that the Fourteenth Amendment should not be "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.*

B. Texas Family Violence Prevention Act

Petitioners argue that the Texas Family Violence Prevention Act, Art. 5.01 et seq. of the Texas Code of Criminal Procedure mandates or creates a legal duty of police officers to give "maximum protection" to victims of domestic violence, and imposes a duty to arrest perpetrators of domestic violence. A thorough reading, however, of the statute imposes no such duty on police officers, and it does not impose the legal obligation, and concomitant constitutional violation, claimed by the Petitioners. Tex. Crim. Proc. Code Ann., Art. 5.04(a), 14.03(a).

C. Equal Protection

The Court of Appeals for the Fifth Circuit has held that the general principle in *DeShaney* – that is, that there is no constitutional right to police protection – should not

be so easily circumvented "by converting every Due Process claim into an Equal Protection claim, via an allegation that state officers exercised their discretion to act in one incident but not in another." *McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989).

To properly prove an equal protection claim, plaintiffs must show that the failure to arrest is a discriminatory policy directed at a protected class, and there must be some probative, substantial evidence of that policy, not, simply, the officers' distaste for certain types of arrests or the plaintiff's statistical summaries. Further, the Petitioners must first establish that others similarly situated were treated differently. Trial Court Opinion p. 12; *McKee*, 877 F.2d at 415-16; *Wheeler v. Miller*, 168 F.3d 241, 251 (5th Cir. 1999).

Here, as in *McKee*, this was never done, and there is no hard, clear evidence of a discriminatory policy directed by the City at a protected class, and that failure renders all else immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

D. Municipal Custom or Policy

Under any theory of civil rights law, a municipality can *only* be held liable if the action that is alleged to be unconstitutional implements or executes a *municipal policy or custom* that is the "moving force" of the violation. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978); *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 137 L. Ed. 2d 626, 630, 117 S.Ct. 1382, 1388

(1997). Importantly, a single or random incident of unconstitutional behavior will not create policy or hold a municipality liable under *Monell, City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L. Ed. 2d 791 (1985). Accordingly, municipal bodies cannot be held liable under the theory of *respondeat superior*, so to be subject to any liability, the governmental body itself must have acted wrongly. *Monell*, 436 U.S. at 691; *Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir. 1989). "Where the city is sought to be held liable on the basis of actions by low-level employees such as those of [a police officer] . . . these must be shown to have been carried out in obedience to overall municipal custom or policy." *Rodriguez*, 871 F.2d at 554. "Isolated violations," or particular "shotgun" facts of one claimant's case, or bald assertions and conclusory allegations, do not establish the requisite proof of municipal policy or custom of constitutional deprivations. *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995).

In order to prevail upon the theory of inadequate training or supervision, a plaintiff must show that there existed an identifiable and *deliberately indifferent* policy; that is, a continuing widespread persistent pattern of unconstitutional misconduct, with deliberate indifference by the municipality's policy makers, and that this custom or policy was the moving force behind the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 390-92, 109 S.Ct. 1197, 1204 (1989); *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 646 (8th Cir. 1990).

There is nothing in the complaint, below, nor in the summary judgment evidence, to suggest any substantive

evidence of a City policy or custom which deprives citizens of their constitutional rights.

E. Causation

The general rule in Texas is that a person does not have a legal duty to control the conduct of third parties, and such a determination is normally a question of law. *Conteq Realty, Inc. v. Siegler*, 894 S.W.2d 195, 197 (Tex. 1995). The duty of a police officer is to the public at large, not to a particular individual, unless a "special relationship" exists between that person and the officer. *Vaquera v. Salas*, 810 S.W.2d 456, 461 (Tex. App. – San Antonio 1991, *writ denied*).

Furthermore, it is well settled that "a person's criminal conduct is a superseding cause extinguishing liability of an alleged negligent actor." *Skipper v. U.S.*, 1 F.3d 349, 353-354 (5th Cir. 1993) citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987).

Clearly, there was no duty on the part of the El Paso Police Department to control the acts of Alejandro Alvarez, and there was no "special relationship" between Mrs. Alvarez and any employees involved.

F. Sovereign Immunity and its Waiver

A municipality is entitled to sovereign or governmental immunity, and waives that immunity only if liability arises under the Texas Tort Claims Act (the "Act") in only three areas: claims arising from the operation or use of motor-driven equipment, from premises defects, and the condition or use of tangible personal property.

Tex. Civ. Prac. & Rem. Code § 101.021; *University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994).

1. Condition or Use of Tangible Personal Property

Essentially, the Act allows for a waiver of governmental immunity when injury is caused by the "use" of the property, but there must be a causal connection between the alleged such use and the injuries claimed, and the mere presence of a tangible piece of property together with some negligent act by a government employee is insufficient. *Wilkins v. State*, 716 S.W.2d 96, 98 (Tex. App. – Waco 1986, writ ref'd n.r.e.); *Marroquin v. Life Management Center for MH/MR Services*, 927 S.W.2d 228, 232 (Tex. App. – El Paso 1996, writ dism'd).

Importantly, the use of computers or telephones to communicate "information" is not a use of tangible personal property, and there is no waiver of sovereign immunity by using, misusing, or not using information. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994).

2. Operation or Use of Motor-driven Vehicle

As with the allegation of use or misuse of tangible personal property, the Texas Supreme Court has held that liability arising from the operation or use of a motor-driven vehicle requires a clear nexus between the injury and the actual negligent operation of the government's vehicle. *LeLeaux v. Hampshire-Fannett I.S.D.*, 839 S.W.2d 56 (Tex. 1992).

3. Method of Providing Police Protection

When the petition and the briefs are read, in their entirety, and objectively, the claim is, essentially, that the City is liable simply for failing to provide police protection. Under the Act – and specifically so – the City's tort immunity remains intact for any failure to provide, or the method of providing, police protection. Tex. Civ. Prac. & Rem. Code, § 101.055(3); *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979).

CONCLUSION

The U.S. Fifth Circuit Court of Appeals has reached the correct interpretation and result in this case. That decision is in complete harmony with congressional intent and the surrounding case law – including that of this Court – and the petition should be denied.

Respectfully submitted,

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